Supreme Court, U.S.
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No. 95-1961

In The

Supreme Court of the United States

October Term, 1995

GEORGE E. HOPKINS, JR.,

Petitioner,

v.

BALTIMORE GAS AND ELECTRIC COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

LUTHER ELLIS JUSTIS, JR.
17th Floor Gas and Electric Building
39 W. Lexington Street
Baltimore, Maryland 21201
(410) 234-5538

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF IN OPPOSITION

NOW COMES Respondent, Baltimore Gas and Electric Company[1] ("BGE"), by its attorney, Luther Ellis Justis, Jr., and pursuant to Rules 15, 33 and 34 of the Supreme Court Rules, files this Brief in Opposition to Petitioner's Petition for Writ of Certiorari and as grounds therefore states:

1. The ruling by the United States Court of Appeals for the Fourth Circuit, affirming the United States District Court for the District of Maryland granting of Respondent's Motion for Summary Judgment, is not in conflict with any other United States Court of Appeals.

2. The Fourth Circuit Court of Appeals made no decision in the instant case which conflicts with applicable decisions of this Court.

3. The Fourth Circuit Court of Appeals, in affirming the District Court's decision, applied the established standards set by this Court for Title VII sexual harassment cases.

4. Petitioner raises no special and important reasons for the granting of certiorari.

5. Petitioner misrepresents the facts and issues in his Petition. Petitioner filed an action against BGE alleging sexual discrimination/harassment and retaliation in violation of title VII of the Civil Rights Act of 1964. The opinion of the District Court (Senior Judge Harvey) at

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[1] There are no parent or subsidiaries of BGE which are required to be listed pursuant to Supreme Court Rule 29.6.

pages A26 through A43 of the Petition for Writ of Certiorari sets out in detail the Petitioner's version of the facts. See footnote 1 at A26 of Petition. Furthermore, the Fourth Circuit in its opinion sets out the facts Petitioner relied upon in attempting to make out his case of sexual harassment (at pages A4 through A7 of Petition). All of the facts relied upon by both the District Court and the Fourth Circuit Court of Appeals were taken in the light most favorable to Petitioner. The District Court in footnote 1 at page A26 of Petitioner's Petition for Writ of Certiorari stated, "Even accepting as true plaintiff's version of the various events, this Court has concluded that plaintiff has failed to make out a prima facie case either of sex discrimination or of retaliation under Title VII." The Fourth Circuit analyzed at length Petitioner's facts and also concluded that those facts do not establish a prima facie case of sexual harassment under Title VII. (A21 of Petition)

ARGUMENT

I

THE TITLE VII "HOSTILE ENVIRONMENT" ANALYSIS BY THE FOURTH CIRCUIT COURT OF APPEALS WAS CORRECT

The threshold issue in the instant case, as well as in any hostile environment sexual harassment case, has been well established by the United States Supreme Court.

Title VII prohibits sexual harassment that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment.

Meritor Savings Bank v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986).

Harris v. Forklift Systems Inc., ___ U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) reaffirmed the standard stated in *Meritor*.

> This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in Meritor, "mere utterance of an . . . epithet which engenders offensive feelings in a employee," ibid. (internal quotation marks omitted) does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

In *Harris*, this Court stated:

> But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminating conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining

> whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.
>
> *Id* at 370.

Petitioner must show that the environment would be perceived and is perceived hostile or abusive. *Harris* supra at 370; *Meritor* supra at 477 U.S. at 67, 106 S.Ct. at 2405. In other words, it is not necessary for plaintiffs to show that there was psychological injury but there is a necessity to show there was a hostile or abusive work environment and that the hostile environment was due to discriminating conduct based upon the plaintiff's Title VII protected status (e.g., sex, race, religion, national origin).

In the instant case, the Fourth Circuit, as did the District Court, carefully considered the entire record and reviewed the record and specifically concluded that the alleged harassment was not sufficiently severe or pervasive to create an objectively hostile or abusive work environment that a reasonable man would find hostile or abusive. *Hopkins v. Baltimore Gas and Electric Company*, 77 F.3d 745 (4th Cir. 1996) (Petition at A19)

Specifically, the Fourth Circuit in reviewing, the Petitioner's facts found:

First. That the alleged incidents occurred intermittently over a seven year period with gaps between incidents as great as a year. (Petition at A19)

Second. The alleged conduct was sexually neutral or, at most, ambiguous. Notably, Hopkins has not asserted

that any overt sexual proposition or sexual touching were made. (Petition at A19)

Third. Several incidents relied upon by Hopkins occurred in group settings and only Hopkins subjectively perceived them to have been directed solely at him. (Petition at A20).

As pointed out above, the allegations, which were taken as true, were reviewed carefully and extensively by both the District Court and the Fourth Circuit Court of Appeals and both found that as a matter of law the conduct complained of by Petitioner does not establish a prima facie case of sexual harassment under Title VII.

Petitioner attempts to create a cause of action where none exists as he has not shown facts which rise to the level of sexual harassment under Title VII.

The Fourth Circuit summed up this case by holding that as a matter of law the conduct of which Hopkins complains, spread over seven years with significant time gaps between incidents, does not create a sufficiently hostile environment on which to rest a Title VII claim. (Petition at A21)

II

SAME GENDER SEXUAL HARASSMENT

Petitioner attempts to make this case into more than it really is by clouding the issue with a question of whether same gender sexual harassment is actionable under Title VII. However, the attempt to reach that issue is defective. The underlying hurdle which Petitioner fails to surmount is: Was there sexual harassment. As pointed

out above in Section I, the harassment claimed by Petitioner does not rise to the level of actionable sexual harassment under Title VII. Obviously if there is no sexual harassment then Petitioner's attempt to have this Court review the same gender sexual harassment issue is moot.

Furthermore, there is no dispute among the Circuit Courts of Appeal on this issue.

The Fifth Circuit has expressly refused to recognize a cause of action for same gender sexual harassment. *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-52 (5th Cir. 1994). No other circuit has specifically ruled on the issue. While the Fourth Circuit's decision in *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) technically did not reach the issue of the actionability of same gender sexual harassment, the Court's discussion and analysis suggests that there should be no cause of action for same gender sexual harassment.

In the instant case, the Fourth Circuit Court of Appeals, all three judges, held that there was no actionable sexual harassment and therefore there was no actionable cause of action for Petitioner under Title VII for sexual harassment. *Hopkins* supra (Petition at A21) irrespective of whether Title VII covers same gender harrassment or not.

The Hopkins Court stated:

> Because we conclude that [the] alleged conduct was not sufficiently severe or pervasive for [Petitioner] to establish a prima facie case of sexual harassment under Title VII, we do not

> reach the question of whether it was directed at [Petitioner] because of his sex.
>
> *Hopkins* supra (Petition at A21)

Consequently, as the issue of same gender sexual harassment was not reached by the Fourth Circuit Court of Appeals, the issue is not before this Court and should be dismissed.

III

CONCLUSION

The instant case is simply a case where Petitioner failed to make out a prima facie case of sexual harassment. Petitioner did not show that the conduct of the alleged harasser was sufficiently pervasive or severe to constitute a violation of Title VII for sexual discrimination/harassment.

The Fourth Circuit examined the totality of the circumstances, in accordance with *Meritor* and *Harris*, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (Petition at A18)

Even assuming arguendo that the conduct did occur as alleged by Petitioner, that conduct simply does not make out a case of sexual harassment actionable under Title VII.

The question of whether same gender sexual harassment is actionable under Title VII was not reached by the Fourth Circuit. Consequently, this Court should reject the

Petitioners attempt to cloud the real issue in this case (was there actionable sexual harassment, irrespective of the gender of the parties) and reject Petitioner's request to review same gender sexual harassment under Title VII.

For the reasons set forth above, Respondent, BGE respectfully requests this Honorable Court to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

LUTHER ELLIS JUSTIS, JR.
17th Floor, G&E Building
39 W. Lexington Street
Baltimore, Maryland 21201
(410) 234-5530

Attorney for Respondent
Baltimore Gas and Electric Company